NO. 4095

In the

United States Circuit Court of Appeals

For the Ninth Circuit

THE BLUM-O'NEILL COMPANY, a Corporation,
Plaintiff in Error

vs.

F. J. SULLIVAN, **Defendant in Error**

Upon Writ of Error to the United States District Court for the Territory of Alaska, Third Division

Brief for Defendant in Error

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Statement of the Case

Sullivan sued defendant company to recover damages for personal injuries sustained while in its employ. There was a verdict for Sullivan. Defendant company sued out a writ of error.

We discuss the errors assigned, as follows:

I.

As to the admissibility of certain testimony given in support of the complaint. (Assignment of Errors Nos. I. and II.)

II.

As to alleged insufficiency of the complaint; motion for a nonsuit, and motion for a directed verdict. (Assignment of Errors Nos. III and IV).

III.

Assignments V, VI, VII, VIII, IX, X, XI and XII are directed to certain instructions given by the Court and to other instructions refused.

ARGUMENT

I.

(A) Objection to admission of Plaintiff's exhibit "A".

Plaintiff in error has taken an exception to the admission in evidence of a certain X-ray plate which was taken by Dr. Beeson at Anchorage and admitted as Plaintiff's Exhibit "A". The testimony of witness Sullivan shows that the X-ray plate was developed in his presence and he positively identifies the exhibit

as the picture taken. As stated by the Judge of the trial court in his opinion on motion for new trial (Record, p. 195): "All that is required in such cases is that the photograph be sufficiently identified." The evidence of the witness Sullivan identifying the plate was uncontradicted and his creditability was for the jury.

(B) Objections to the admission of the testimony of Dr. J. L. Bulkley.

The plaintiff in error takes exception to the testimony of Dr. Bulkley, a witness for defendant in error. By his testimony Dr. Bulkley clearly distinguishes between testimony as to the plate, which testimony is given by him as an expert in the taking of X-ray pictures, and in the testimony given by him as to the condition of the injured limb of defendant in error, based upon personal examinations made by him as a surgeon, whose skill is expressly admitted by plaintiff in error.

"Mr. Dimond: We will admit he is fully qualified as a doctor." (Record, p. 81).

"Mr. Dimond: I will admit Dr. Bulkey can take X-Ray pictures and is generally qualified as a physician." (Record, p. 82).

"Mr. Dimond: We will admit his general qualifications." (Record, p. 83).

II.

The general demurrer alleges the complaint does not state facts sufficient to constitute a cause of action, for failure to plead sufficient to show the vice principalship of Frederickson, alleged to be superintendent. We submit the complaint alleges facts sufficient to make a case.

III.

The motions for nonsuit and for directed verdict are based upon the insufficiency of proof and the failure of proof on the part of Sullivan to prove the vice principalship of Frederickson, alleged superintendent of the defendant company.

Under the evidence of the defendant in error Sullivan, as supported by witness Satterlee, the witness Frederickson was employed as superintendent in sole charge of the warehouse department of plaintiff in error. His duties as such, according to the testimony of these witnesses, included the management of retail sales of merchandise in the building over which he had exclusive control. These retail sales had no connection with the retail business handled by plaintiff in error at the main retail store and amounted to some considerable sum, as much as fifty or sixty dollars a day. It is further testified by defendant in

error, that at times the superintendent Frederickson employed and discharged men who were needed for short jobs, although defendant in error was employed by the head office of plaintiff in error corporation. It is further testified that superintendent Frederickson had sole charge and direction of the manner of the delivery of goods, the manner of loading wagons and the general conduct of the wholesale business of plaintiff in error. We contend that the above testimony is ample to place the question of the vice principalship of Frederickson directly before the jury, although nearly all of these statements were denied, in whole or in part, by the witnesses of plaintiff in error. The witness Sullivan was not impeached and his testimony, for the purpose of this appeal, must be taken as true.

Decisions of the United States Supreme Court, the Federal Courts and of the various states, on the question of vice principalship are so hopelessly conflicting as to make it almost impossible to determine what the true rule is. The Ross case, 112 U. S. 377, 28 Law Ed. 787, attempted to make the question of vice principalship dependent on position. The later cases modified and distinguished this rule and no satisfactory line of reasoning of any of the courts of the latter part of the nineteenth century seems to have been

arrived at. The better and more logical rule appears to be to the effect that the master is liable for any negligence which involves the breach of one of his personal duties.

"Whether the employee whose negligence caused the injury was or was not a vice principal is determined by the nature of the functions which he was, as a matter of fact, discharging at the time when the injury was received, and not by the appellation by which he was designated. His official denomination will not, of itself, determine whether or not he was a representative of the master."

Greenway vs. Conroy (1894) 160 Pa., 185, 40 Am. St. Rep. 715, 28 Atl. 692.

Miller vs. Southern R. Co. (1891) 20 Or. 285, 26 Pac. 70.

Moore vs. Dublin Cotton Mill (1907) 127 Ga. 609, 10 L. R. A. (N. S.) 772, 56 S. E. 839.

Smith vs. American Car & Foundry Co., (1906) 122 Mo. App. 610, 99 S. W. 790.

In Baltimore & Ohio Railway Co., vs Baugh, 149 U. S. 368-387, the court says: "A master assumes the duty towards his servant of exercising reasonable care and diligence to provide the servant with a reasonably safe place at which to work. . . . ."

The later decisions of the Federal Courts undoubtedly follow this rule. See Collins vs. Barner, 268 Fed. 699.

In the case at bar there is testimony which must have been persuasive to the jury in order for them to find a verdict for defendant in error to the effect that Frederickson directed defendant in error as to the manner of loading goods on the delivery wagon. (Record, p. 30).

Q. When you were delivering goods who, if anyone, gave directions as to the loading?

A. There was just two of us there and Mr. Frederickson gave me orders as to the loading.

Q. What kind of directions or orders?

A. Well, he directed me as to how to put on my orders to the best advantage. If he would see me loading he would tell me the best way, or say this is a better way, and tell me where to go or bring something from the warehouse some place, but he always told me to come back and where to go afterwards.

Q. And as to the placing of the orders on the wagons?

A. Sometimes he helped me and most of the time I did it myself.

Q. Were you directed by anyone but Frederickson?

A. By Frederickson, always.

It is undisputed that the proximate cause of the injury of Sullivan was the overloading and improper loading of the wagon which, according to the evidence of defendant in error, was directed and super-

vised by Frederickson. We contend that this improper loading brings this case directly within the rule of the Baugh case, and was an exercise by Frederickson of the non-delegable duty of Fredickson's employer to maintain a safe place for Sullivan to work.

"Duty of furnishing reasonably safe place to work, including reasonably safe means of access thereto, cannot be delegated so as to remove master from liability."

Hartman vs. Toyo Kisen Kaisha SS. Co., 244 Fed. 561.

Missouri Valley Bridge & Iron Co., vs. Walquist, 243 Fed. 120.

Cincinnati N. O. & T. P. Ry Co., vs. Hall, 243 Fed. 76.

Sutherland vs. Buckeye Cotton Oil Co., 259 Fed. 709.

"A servant discharging nondelegable duty of master to furnish safe appliances is a "vice principal" instead of a "fellow servant."

Consolidated Interstate-Callahan Mining Co. vs. Witkouski, 249 Fed. 833, 162 C. C. A. 67.

Upon the questions raised as to negligence of fellow servant, assumption of risk, and contributory negligence, we contend the matter was rightly submitted

to the jury by the trial court. Error cannot be successfully predicated upon the submission to a jury of a question of fact, even though disputed. The record supports the action of the trial court. The provisions of the Alaska Code make the jury the exclusive judges of the facts and of the creditability of the witnesses.

Sec. 1064. All questions of fact other than those mentioned in section one thousand and sixty-five shall be decided by the jury, and all evidence thereon addressed to them.

Sec. 1065. All questions of law, including the admissibility of testimony, the facts preliminary to such admission, and the constructions of statutes and other writings and other rules of evidence, are to be decided by the court, and all discussions of law addressed to it; and whenever the knowledge of the court is by this code made evidence of a fact, the court is to declare such knowledge to the jury, who are bound to accept it as conclusive.

(Compiled Laws of Alaska, 1913).

The modern rule is laid down by the supreme court in Kreigh vs. Westinghouse, 214 U. S. 249-258:

"Questions of negligence do not become questions of law to be decided by the court, except where the facts are such that all reasonable men must draw the same conclusion from them, and the case is not to be withdrawn from the jury unless the conclusion follows as a matter of law that no recovery can be had

upon any view which can be properly taken of the facts the evidence tends to establish'' Gardner vs. Mich. Cent. Railroad 150 U. S. 349, 361.

''The question of contributory negligence on the part of the plaintiff was for the jury.''

Cunard Steamship Co. vs. Carey, 119 U. S. 245.

''The question of negligence on the part of the master and contributory negligence was for the jury.''

Northern Pacific Ry. Co., vs. Mortensen, 63 Fed. 530.

Nelson vs. New Orleans and N. E. R. Co., 100 Fed. 731.

Bethlehem Iron Co. vs. Weiss, 100 Fed. 45.

Smith vs. Southern Ry., 75 Fed. 105.

Thompson vs. Chicago M. and St. P. Ry Co. 14 Fed. 564.

Amate vs. Northern Pac. R. Co., 46 Fed. 561.

''On conflicting evidence in servant's action for injury through fall of scaffold, whether he was required to go on it in the course of employment, **held** for jury.''

E. I. Dupont de Nemours & Co., vs. Kelly, 252 Fed. 523; 164 C. C. A., 439.

''In action for death of employee of lumber company, killed when load of planks fell from car which employee and others were moving, question of employee's assumption of risk, **held** under evidence, for jury.''

Sundin vs. Edward Rutledge Timber Co., 249 Fed. 809; 162 C. C. A. 43.

"Negligence is a question of law only, when the facts are such as to lead to but one conclusion."

Gardner vs. Michigan Central Railroad Co., 150 U. S. 349-361; 37 Law Ed. 1107.

Chicago, etc., Ry vs. Healy, 86 Fed. 249.

Aetna L. Ins. Co. vs. Vandecar, 86 Fed. 290.

Omaha Street Railway Co. vs. Craig, 39 Neb. 617; 58 N. W. 213.

McGovern vs. Philadelphia & R. R. Co., 235 U. S. 389.

Chesapeake and O. R. Co. vs. De Atlay, 241 U. S. 310.

"We have no doubt that the evidence raised disputed questions of fact as to whether defendant was guilty of the negligence charged in the complaint, and whether plaintiff was guilty of contributory negligence, as set up in the answer, both of which were properly determinable solely by the jury, and that the court committed prejudicial error when it passed upon those issues of fact and directed a verdict."

Gunn vs. Standard Oil Co., 275 Fed. 934.

As stated in Labbatt's Master and Servant, Volume 4, page 4988:

"The culpability of either of the parties to the action is always a matter for the jury to determine, whenever there is a conflict of testimony as to the facts

upon which the existence or nonexistence of that culpability hinges; and also where those facts, although they may be clearly established or undisputed, are of such a nature that reasonable men may fairly differ upon the question whether they do or do not import culpability."

Further recent authorities to the effect that all questions of fact are for the jury to determine, whether on the question of vice principalship, assumption of risk, contributory negligence and fellow servant, have been cited by the trial judge in his opinion on motion for a new trial. (Record, pp. 193-4):

Myers vs. Pittsburgh Coal Co. 233 U. S. 184;

Tex. & Pac. R. Co. vs. Prater, 229 U. S. 177.

C. R. I. & P. R .Co. vs. Brown, 229 U. S. 317.

Tex. & Pac. R. Co. vs. Harvey, 228 U. S. 319.

Brewery Co. vs. Schmidt, 226 U. S. 162.

Davis vs. Scroggins, 284 Fed. 760.

Dahlen vs. Hines, 275 Fed. 817.

Gunn vs. Standard Oil, 275 Fed. 932.

St. L. R. Co. vs. Jeffreys, 276 Fed. 73.

Woodward vs. Bimbaugh, 276 Fed 1.

Gover vs. A. P. A., 278 Fed. 927. (This was an Alaska case in the Ninth Circuit).

Davis vs. Reynolds, 280 Fed. 363.

Watson Coal & M. Co. vs. Greeson, 284 Fed. 510.

Atlantic Coast Line R. Co. vs. Williams, 284 Fed. 262.

Collins vs. Barner, 268 Fed. 699. (A case of a badly loaded elevator).

Patton vs. Kenmont Coal Co., 268 Fed. 334.

Dunton vs. Hines, 267 Fed. 452.

Southern R. Co., vs. Miller, 267 Fed. 376.

Gibson vs. Germat, 267 Fed. 305.

McMillan vs. Alaska Fish Co., 266 Fed. 26. (Another Alaska case in the Ninth Circuit).

ASSUMPTION OF RISK

We respectfully refer this Honorable Court to the recent reported case of Panama R. Co. versus Johnson, 289 Fed., 964, and quote from the opinion of the circuit judge, pp. 978-9, as follows:

"In Narramore vs. Cleveland C. C., & St. L. Ry. Co., 96 Fed. 298, 301, 37 C. C. A. 499, 501 (48 L. R. A. 68) Judge Taft, writing for the Circuit Court of Appeals of the Sixth Circuit, said:

" 'Assumption of risk' is a term of the contract of employment, express or implied from the circumstances of the employment, by which the servant agrees that dangers of injury obviously incident to the discharge of the servant's duty shall be at the servant's risk. In such cases the acquiesence of the servant in the conduct of the master does not defeat a right of action on the ground that the servant causes or

contributes to cause the injury to himself, but the correct statement is that no right of action arises in favor of the servant at all, for, under the terms of the employment, the master violates no legal duty to the servant in failing to protect him from dangers the risk of which he agreed expressly or impliedly to assume."

In St. Louis Cordage Co. vs. Miller, 126 Fed. 495, 502, 61 C. C. A. 477, 484 (63 L. R. A. 551) Judge Sanborn writing for the Circuit Court of Appeals for the Eighth Circuit, said:

"Assumption of risk is the voluntary contract of an ordinarily prudent servant to take the chances of the known or obvious dangers of his employment, and to relieve his master of liability therefor."

In Jellow vs. Fore River Ship Building Co., 201 Mass. 464, 467, 87 N. E. 906, 908, the Supreme Judicial Court of Massachusetts said on this same subject:

"It should not be overlooked that, where the use of the terms 'risk' and 'acceptance of the risk' are involved, the true question is whether, in incurring the particular danger in question, the plaintiff accepted the risk in the sense that by continuing at his work he agreed to relieve the defendant from the possible results. The plaintiff consequently, not only must be shown to have known of the risk, but, by implication from his conduct, must be found to have voluntarily assumed it." Wagner vs. Boston Elevated Railway, 188 Mass. 437, 440, 441, and cases cited."

That the act of the servant in assuming the risk must have been voluntary and not under constraint is well established law. In Shearman & Redfield on Negligence, Vol. 1 (6th Ed.) Sec. 207, the law is said to be that:

"A risk must be voluntarily assumed, to relieve the master from liability. Risks incurred under coercion are not assumed."

And in section 211A it is said:

"As already stated, it is now held by the most conservative authorities that a servant is not deprived of his right to recover for defects caused by his master's negligence, arising or first coming to the servant's notice, after he has entered into service, unless he assumes the risk of his own free and unconstrained will. If, therefore, he continues to incur the risk of such defects under any kind of necessity, or coercion, he does not voluntarily assume the risk, and is not, necessarily, debarred from recovery thereby."

See Richmond, etc., Ry. Co. vs. Norment, 84 Va. 167, 4 S. E. 211, 10 Am. St. Rep, 827; O'Malley vs. South Boston Gaslight Co., 158 Mass. 135, 32 N. E. 1119, 47 L. R. A. 161; Lee vs. St. Louis M. and S. E. R. Co., 112 Mo. App. 372, 87 S. W. 12; Rase vs. Minneapolis, St. Paul, etc., R. Co., 107 Minn. 260, 120 N. W. 360, 21 L. R. A. (N. S.) 138; Montgomery vs. Seaboard Air Line Ry., 73 S. C. 503, 53 S. E. 987; Elie vs. Cowles, 82 Conn. 236, 73 Atl. 285.

And in Labatt on Master and Servant, Vol. 4 (2nd Ed.), Sec. 1365, p. 3934, it is said:

"If a danger is not so absolute or imminent that injury must almost necessarily result from obedience to an order, and the servant obeys the order and is injured, the master will not afterwards be allowed to defend himself on the ground that the servant ought not to have obeyed the order."

III.

Counsel for plaintiff in error has selected certain parts of the instructions of the court and predicated error thereon. In the words of Judge Carland of the Eighth Circuit as set forth in his opinion in the case of St. Louis & S. F. Ry., Co., vs. Jeffries, reported in 276 Fed. 73:

"We do not deem it necessary to cite authorities in support of the proposition that counsel may not select particular portions from the charge for the purpose of assigning error, but the whole charge must be taken together, and if it appears that the case is fully and fairly stated, the mere fact that certain passages standing alone would be subject to criticism, is not important. The jury in this case were told that they must take the charge as a whole, and we have no doubt that the charge as a whole fully, correctly and fairly presented the case to the jury."

As to the refusal of the Court to grant certain instructions, we submit that the instructions asked for are fully covered by the instructions given.

Defendant in error, therefore, respectfully submits that the case, on the whole record, wholly fails to disclose any reversible error.

Respectfully submitted,

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